

The Commonwealth of Massachusetts
Public Employee Retirement Administration Commission
John W. McCormack Building, Room 1101
One Ashburton Place Boston, MA 02108
(617) 727-9380

M E M O R A N D U M

TO: All Retirement Boards

FROM: John J. McGlynn, Executive Director

RE: Settlement of EEOC Physical Examination Lawsuit

DATE: March 14, 1997

In 1993 the U.S. Appeals Court ruled that G.L. c. 32, §90F violated the ADEA. Retirement Boards were advised that persons remaining in service after age 70 were no longer required to take and pass a physical examination in order to remain in service.

In 1995 the EEOC brought an action to recover damages from the Commonwealth with respect to those persons who were required to be examined.

On February 27, 1997, after lengthy negotiations between the EEOC and the Attorney General's Office representing the Commonwealth, the matter of damages was resolved by means of a Settlement Agreement. Under the Agreement, the Commonwealth will pay those persons who took and paid for a physical examination between August 22, 1987 and March 30, 1993. Each person who properly makes a claim for damages will receive \$35.00 per examination. If the person paid more than \$35.00 for an examination plus any required prescriptions, he or she will receive this amount upon submission of "adequate proof". The mechanism and method for determining who will receive payment is contained in the Settlement Agreement and its attachments, a copy of which is included with this Memorandum.

MEMORANDUM - Page Two

TO: All Retirement Boards
FROM: John J. McGlynn, Executive Director
RE: Settlement of EEOC Physical Examination Lawsuit
DATE: March 14, 1997

The Settlement requires PERAC to obtain the following information from each retirement board:

a) the most recently listed names and addresses of all system members who took the annual physical examination required by G.L. c. 32, §90F between August 22, 1987 and March 30, 1993; or

b) the most recently listed names and addresses of all system members who worked past age 70 between August 22, 1987 and March 30, 1993.

These lists must be provided to PERAC on or before May 5, 1997 so that they can be transmitted to the EEOC before May 13, 1997 as required by the Settlement.

If you have any questions with regard to the lists required by the Settlement Agreement, please contact this office.

/sjk
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Attachment

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

COMMONWEALTH OF MASSACHUSETTS and
the BARNSTABLE COUNTY RETIREMENT
ASSOCIATION,

Defendants.

Civil Action Number

89-1959-EFH

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED, by and among counsel for the plaintiff Equal Employment Opportunity Commission (the "EEOC"), the defendant Commonwealth of Massachusetts (the "Commonwealth"), and the defendant Barnstable County Retirement Association ("BCRA") as follows:

1. Pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), all claims in the above-entitled action against the Commonwealth and BCRA shall be dismissed with prejudice. The parties agree that the Stipulation of Dismissal does not prevent the plaintiff from bringing, in this Court, an action in contract for breach of the Settlement Agreement appended as Exhibit A. The parties also agree that the Court shall retain jurisdiction of any "disputed claims" as defined in Paragraph 3 of said Settlement Agreement.

2. The EEOC, the Commonwealth, and BCRA shall each bear

their own costs and attorney's fees.

DATE: _____

Attorneys for Plaintiff
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COMMISSION

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Attorney for Defendant
BARNSTABLE COUNTY RETIREMENT
ASSOCIATION

James H. Quirk, Jr.
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(508) 362-6262

CERTIFICATE OF SERVICE:

I hereby certify that a true copy of the above
document was served upon the attorney of
record for each other party by mail on 2/27/97

SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into on this 27th day of February, 1997 by and between the Plaintiff Equal Employment Opportunity Commission (the "EEOC") and the Defendants Commonwealth of Massachusetts (the "Commonwealth") and the Barnstable County Retirement Association ("BCRA").

WITNESSETH THAT

WHEREAS, certain disputes and differences have arisen between the EEOC and the Commonwealth and BCRA which resulted in the EEOC commencing an action in the United States District Court for the District of Massachusetts, entitled Equal Employment Opportunity Commission v. Commonwealth of Massachusetts and the Barnstable County Retirement Association, Civil Action Number 89-1959-EFH ("No. 89-1959-EFH"); and

WHEREAS the EEOC has alleged in the Complaint that the Commonwealth and BCRA violated the Age Discrimination in Employment Act of 1967, as amended (the "ADEA"), 29 U.S.C. §621 et seq., by, pursuant to a state statute, M.G.L. c. 32, §90F (1992), requiring employees classified in Group 1 to take and pass, at their own expense, an annual physical examination to continue employment; and

WHEREAS the First Circuit has held that said practice violated the ADEA, EEOC v. Commonwealth of Massachusetts, 987 F.2d 64 (1st Cir. 1993); and

WHEREAS BCRA asserts that its members were not-required to and in fact did not pay, at their own expense, for the annual

examination required by the now-superseded portion of M.G.L. c.32, §90F; and

WHEREAS the parties, desiring to avoid the costs of continued litigation, have agreed that it is in their mutual interests to resolve all remaining issues regarding it upon the terms and conditions more fully set forth hereinafter;

NOW THEREFORE, in consideration of the mutual promises and covenants set forth herein, the EEOC, the Commonwealth, and BCRA hereto covenant and agree as follows:

1. The Eligible Class: The class of persons eligible to receive damages shall be all persons classified in Group 1 who, between August 22, 1987 and March 30, 1993, inclusive ("the relevant time period"), took and paid for the annual physical examination formerly required by M.G.L. c. 32, §90F ("the eligible class"). The potential members of the eligible class will be identified as follows:

(a) The Commonwealth of Massachusetts Teachers Retirement Board ("Teachers Retirement") has already identified the only 56 persons who are members of the Teachers Retirement System who fall within the eligible class.

(b) The State Retirement Board ("State Retirement") will either conduct a manual search or prepare a computer program to identify all state employees who worked past age 70 during the relevant time period. The choice as to which of these

alternatives to follows shall be at State Retirement's discretion.

(c) The Public Employee Retirement Administration Commission ("PERAC"), statutory successor to the former Public Employees Retirement Administration, will require each of the 104 local retirement systems to either (i) send PERAC a list of the most recently listed names and addresses of all system members who took the annual physical examination required by M.G.L. c. 32, §90F during the relevant time period or (ii) send PERAC a list of the most recently listed names and addresses of all system members who worked past age 70 during the relevant time period.

(d) PERAC, State Retirement, and Teachers Retirement will have seventy-five (75) days from the date of entry of the Stipulation of Dismissal to identify potential members of the eligible class in the manner set forth in subparagraphs (a)(c) above, and to forward their names and most recently listed addresses to counsel for the EEOC.

2. Contacting Potential Members of the Eligible Class: Within thirty (30) days of receipt of the names and addresses, the EEOC shall mail to each person identified by the procedures set forth in Paragraph 1 above the form letter appended as Attachment A. The form letter will inform the addressees that they must respond within twenty-one (21) days of the receipt of the letter to be considered for eligibility.

3. Verification: Within one hundred twenty (120) days after receipt of the potential class members' names and addresses as set forth in Paragraph 1(d) the EEOC Will send to counsel for the Commonwealth copies of all certifications referenced in Paragraph 4 of this Settlement Agreement. The EEOC may mail the Commonwealth said certifications in whole or part during the one hundred twenty (120) day period; however, the certifications received by the EEOC during said one hundred twenty (120) day period shall be the only certifications accepted for purposes of relief by the Commonwealth. The Commonwealth shall have thirty (30) days to review the names and amounts identified, to identify any disputed names and amounts ("disputed claims"), and to supply said information to the EEOC. The EEOC and the Commonwealth will have a further thirty (30) days to resolve any dispute.

If the parties are unable to reach an agreement, the disputed claims will be submitted to the Court for resolution. While any disputed claims are being litigated, and within ninety (90) days of the EEOC's transmission of the certifications to the Commonwealth, the EEOC and Commonwealth will execute a supplemental Settlement Agreement that lists the names and addresses and amounts due to each of the undisputed class members. Within a further thirty (30) days the Commonwealth will commence the payment process for the undisputed class members.

4. Certification of Damages: In order to receive damages each potentially eligible class member must fill out the

certification appended as Attachment B and return said within twenty-one (21) days of the receipt of the EEOC's form letter to counsel for the EEOC, who will forward said to counsel for the Commonwealth within one hundred twenty (120) days of the EEOC's receipt of the potential class members' names and addresses as set forth in Paragraph l(d). Failure to return the certification will disqualify the individual from receiving any damages under this agreement.

5. Damages: (a) Except as set forth in 5(b), each person in the eligible class shall receive as damages thirty-five dollars (\$35.00), which amount shall be inclusive of Paragraph all claims for prejudgment or post-judgment interest, for each annual examination actually taken and paid for.

(b) If as a result of his or her physical examination a class member was required to pay more than thirty-five dollars per examination and/or take prescription drugs in order to continue employment the Commonwealth will pay the actual cost of said exam and drugs upon submission of adequate proof of the same to the Commonwealth, which amount shall be inclusive of all claims for prejudgment or post-judgment interest. Inadequate proofs shall mean sufficient proof to persuade a reasonable person that listed events in fact occurred.

(c) The EEOC recognizes that all payments will be made out of the Commonwealth's general fund for the payment of

settlements and judgments, pursuant to the usual procedures for payments out of said funds.

(d) The Commonwealth will not bring a cross or other claim against BCRA to recover any moneys paid as a result of this Agreement to individuals who are members of BCRA.

6. **Stipulation of Dismissal:** The parties agree to execute a copy of a Stipulation of Dismissal with prejudice of No. 89-1959-EFH simultaneous with the execution of this Agreement.

7. **Continuing Jurisdiction:** A copy of the Settlement Agreement will be filed with the Court as an exhibit to the Stipulation of Dismissal referenced in Paragraph 6. As so filed it will constitute a contract among the parties, but not a consent order or consent decree. The Court will retain jurisdiction to entertain actions in contract for breach of the Settlement Agreement and to resolve any "disputed claims" as defined in Paragraph 3 above.

8. **Non-Discrimination:** The Commonwealth and BCRA agree not to enforce or follow those portions of M.G.L. c. 32, §90F (1992) invalidated by the First Circuit in EEOC v. Commonwealth of Massachusetts, 987 F.2d 64 (1st Cir. 1993).

IN WITNESS THEREOF, the EEOC, the Commonwealth, and BCRA hereto have caused this Agreement to be executed as a contract in

their names and on their behalves, as of the date first above written

DATE: _____

Attorneys for Plaintiff
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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February 25, 1997

name
Street Address
City, State, Zip Code

Re: EEOC v. Commonwealth of Massachusetts Civil Action No. 89-1959-EFH (D. Ma.)

Dear Name:

I am a trial attorney with the United States Equal Employment Opportunity Commission ("EEOC"). The EEOC is the federal agency charged by Congress with preventing discrimination in the workplace. Among other laws, the EEOC enforces the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), which makes unlawful discrimination by employers against employees age 40 and older.

In 1989 the EEOC filed suit against the Commonwealth of Massachusetts (the "Commonwealth"), alleging that a state law which required employees classified in Group 1 age 70 and older to take and pass, at their own expense, an annual physical exam to continue employment, violated the ADEA.

The Court has now held that the annual physical exam violated the ADEA, and the EEOC and the Commonwealth have negotiated a settlement. ~

Under the terms of the settlement any person who took, at his or her own expense, an annual physical exam pursuant to the State law between August 22, 1987 and March 30, 1993 is eligible to receive reimbursement in the amount of thirty-five dollars (\$35.00) for every exam actually taken and paid for. Thus a person who took and paid for 3 annual exams would be entitled to 3 x \$35; i.e., \$105.00. In addition, if you actually paid more than \$35 per exam or your doctor would not authorize your return to work if you did not take prescription drugs you may be eligible to have those expenses paid, upon submission of adequate proof of the same.

To obtain reimbursement please fill out the enclosed questionnaire within twenty-one (21) days of receipt of this letter and return it to me at:

Michael J. O'Brien, Trial Attorney
Equal Employment Opportunity Commission
7 World Trade Center, 18th Floor
New York, New York 10048-1102

Please be advised that failure to respond within twenty-one (21) days of receipt of this letter will result in the denial of your claim.

If you have any questions please call me at (212) 748-8512.

Yours truly,

Michael J. O'Brien
Trial Attorney

Enclosure

EEOC v. Commonwealth of Massachusetts
Civil Action No. 89-1959-EFH (D. Ma.)

Return to:

Michael J. O'Brien, Trial Attorney
Equal Employment Opportunity Commission
7 World Trade Center, 18th Floor
New York, New York 10048-1102

1. Name:_____

2. Address:_____

3. Telephone No.:_____

4. The name of the retirement system to which you belong:_____

5. Date of Birth:_____

6. Date of Retirement:_____

7. Did you ever have to pay, at your own expense, for an annual physical exam to continue employment?

Yes / No

8. Number of annual medical exams to continue employment you took and paid for between August 22, 1987 and March 30, 1993:_____

(over)

9. When you took your annual exam did it cost you more than \$35.00 per exam?

Yes / No

10. When you took your annual exam did your doctor inform you that to continue employment you would have to take prescription drugs?

Yes / No

11. Under certain circumstances if you answered yes to either question 9 or question 10 you may be eligible to receive additional reimbursement of those expenses. In order to determine your eligibility please provide copies of bills you received from doctors when you took the annual exam to continue employment required by state law and any bills for prescription drugs the doctor required you to take to continue employment. If you do not have copies of these bills, you may submit any other information or evidence for consideration

I certify that the above
information is true and correct.

(signed) _____

date: _____